MINING IN PERU
The case of ESPINAR

Case Study
November 2023

How mandatory EU due diligence can prevent and mitigate harm

On February 23, 2022, the European Commission published its proposal for a Corporate Sustainability Due Diligence Directive (CSDDD). EU-LAT Network welcomed the long-awaited text as another step in the direction of promoting and guaranteeing respect for human rights in Latin America by the European Union. Since the publication of the Commission's proposal, the Directive has been discussed and amended at the level of both the European Parliament and the Council. Currently, discussions on the Directive are in their final phase of trilogue negotiations between the Commission, Parliament and Council. As trilogue negotiations enter a decisive stage**, it is imperative that the financial sector is included in the scope of the law**.

This Directive could represent an important contribution to minimizing the negative impacts of business on human rights defenders, rural and indigenous communities, and the environment in Latin America and promote corporate accountability, justice highlighting the difference with the paradigm of CSR.

However, despite the many positive elements of the Commission's proposal it falls short on numerous fundamental points that could make this Directive inefficient. The role of the financial sector plays in the CSDDD is crucial when it comes to responding to contexts as critical as that of the mining activities in Espinar, Peru.

The CSDDD lays down rules on obligations of due diligence by companies regarding actual and potential human rights and environmental adverse impacts in their global value chains. It also establishes rules on liability for violations of the due diligence obligation, making it the cross-sectoral regional legislation establishing mandatory due diligence standards which are enforceable by public and private means.

EU companies must respect international standards on labour rights, human rights and environmental protection. The EU has, through this Directive, the opportunity to establish a regulatory framework for private investment by large companies, which could become the global standard in terms of corporate good practices.

In the case of Espinar, as in the rest of Latin America, there is a tendency not to comply with prior, free and informed consent of indigenous peoples and vulnerable communities. Instead, consultation is often seen as a merely administrative requirement by companies. This is a clear sign of their lack of respect for cultures and the various conceptions of development, including the autonomy of peoples and the guarantee of their free self-determination.

One of our main concerns regarding the future Directive is, without a doubt, the inclusion of the financial sector activities within the CSDD. Financial institutions, are crucial to shaping sustainable economic system, exerting leverage over a broad range of other economic sectors and business activities, and have a key role in upholding the protection of human rights, the environment and climate globally and locally. As this case shows, several EU financial sectors are involve in severe adverse impacts on human rights. The CSDDD provides an unprecedented opportunity to support and foster responsible investment and financing practices.

Through the following report, we seek to analyze the situation of Espinar, Peru, as a paradigmatic case that allows us to demonstrate the challenges we are facing and the necessary modifications to the European Commission's proposal. These elements must be addressed to ensure that both in Espinar and in the rest of Latin America, European companies respect human rights and the environment.

The Context of Espinar, Perú and Its Connection to CSDDD

In 2021, out of its US$203bn global turnover, Glencore generated US$64bn in Europe[1] . From this data, it is reasonable to infer that the company falls under the scope of the proposed Corporate Sustainability Due Diligence Directive (CSDDD) which according to the Commission's proposal for non-EU companies requires a net turnover of more than EUR 150 million in the EU as one of two mutually exclusive conditions under the scope of the legislation. However, there is no sufficient publicly available information for a more comprehensive market break-down that would allow to ascertain how much of that European turnover was in fact generated in the EU. Thus, for the purpose of this analysis, the focus will be on Glencore's EU based financiers in the period 2016 – 2021.

In this sense, the case of Espinar is a glaring example of how the proposal's failure to cover the financial sector, fundamentally undermines essential due diligence principles and would render the directive ineffective to establish a robust due diligence duty for financial institutions (FIs). Despite known conflicts in the Congo, Colombia, Zambia and repeated negative reports on Glencore's mining activities in Peru[2], the lack of improvements on the ground shows that EU based financial institutions financing Glencore have failed to implement the voluntary standards designed by the OECD for the financial sector. Therefore, these institutions have not assumed or been held accountable for their responsibility in causing or contributing to adverse human rights and environmental impacts in the global value chain of the company.

In several Latin American countries, including Peru, more than 40 administrative and judicial proceedings have been initiated against Glencore[3]. The accusations are all very similar and show that Glencore's neglect of the negative impacts of mining on people and their environment is not just limited to isolated cases, but extends systematically throughout its operations.

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[1] See Geographical Information, page 172, Glencore Annual report 2021: https://www.glencore.com/dam/jcr:aab67399-639f-4cb2-be57-b3a66f8a91d6/GLEN-2021-annual-report.pdf

[2] Report "Actividades empresariales cuestionables de la mega-corporación minera suiza Glencore y responsabilidad de los bancos alemanes", S. Guhr, J. Sydow y S. Friess. Red sombra observadores de glencore, 2017: https://media.business-humanrights.org/media/documents/files/documents/Estudio-bancos-alemanes-glencore-web_0.pdf

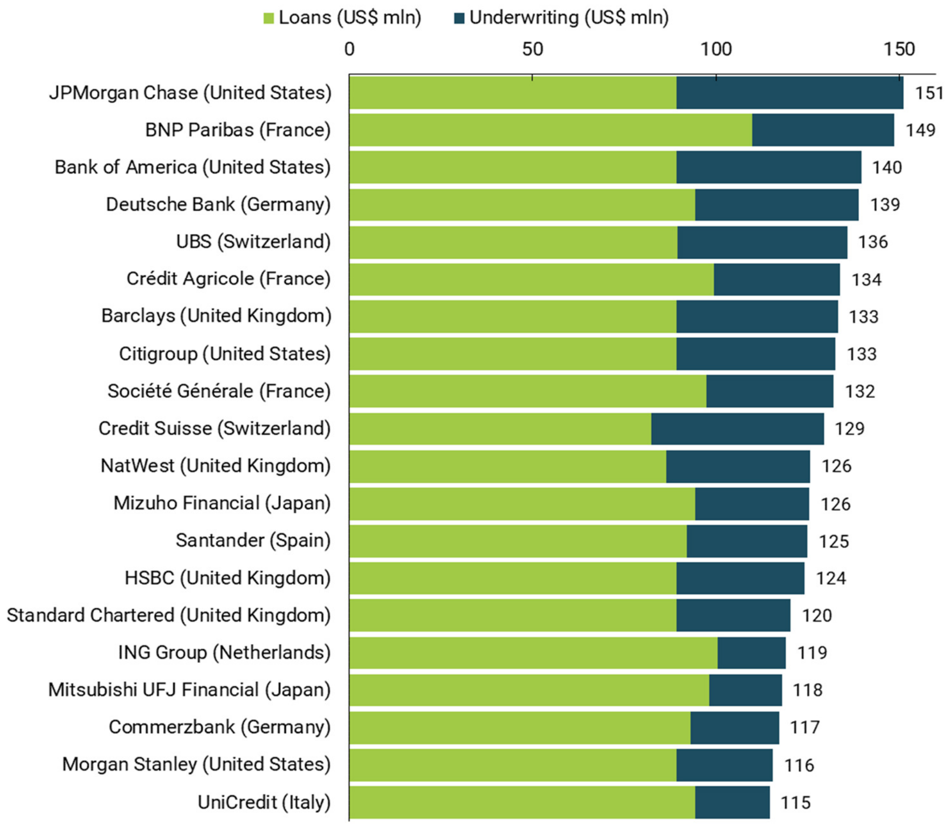
[3] Shadow Network of Glencore Observers (2017), Informe Sombra de las Operaciones de Glencore en Latinoamérica: http://observadoresglencore.com/

EU Based Banks And Investors Financing Glencore’s Antaccapay Mine

Overall, between January 2016 and June 2021, Glencore attracted a total of US$ 4.8 billion in loans and underwriting services and approximately US$ 1.5 billion on shares and bonds from institutional investors which are attributable to the activity of *Compania Minera Antapaccay*. A study conducted by Profundo[4] for this case-study indicates that at least 1.1 billion come from EU based banks and investors.

Between January 2016 and July 2021, the American bank JP Morgan Chase was the main creditor, with US$ 151 million provided in the form of loans and underwriting services. Next in line were BNP Paribas (France) with US$ 149 million and Deutsche Bank (Germany) with US$ 140 million[5].

Figure 1 Top 20 creditors (2016 - June 2021, US$ mln)



Source: Thomson EIKON (2021, June), Loans; Bloomberg (2021, June), Loans; Thomson EIKON (2021, June), Bond Issuances; Bloomberg (2021, June), Bond Issuances; Thomson EIKON (2021, June), Share Issuances; Bloomberg (2021, June), Share Issuances; Bloomberg (2021, June), Loan Search; IJGlobal (2021, June), Transactions search; Trade Finance Analytics (2021, June), Transactions search; Company reports, and media search.

To estimate how much of the overall financing to Glencore is directed towards Antapaccay, an estimated percentage of the company’s operations in the specific activity -the operation of the Antapaccay mine- was calculated. These calculations known as segment adjusters were applied to all identified financing for general

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[4] Source: Profundo, Research and advice. “Glencore financiers: focus on Compania Minera Antapaccay », 28 September 2021

[5] Ibidem

corporate purposes, out of which a certain proportion could have been provided to Antapaccay based on[6]:

- Glencore's copper asset's capital expenditures in "Other South America", as a proportion of Glencore's total capital expenditures. This is to reflect the share of copper mining in the "Other South America" region in Glencore's activity[7].
- Further adjustment of the percentage accounting for the production of copper from Antapaccay, out of total production of copper from "Other South America" (which includes Antapaccay mine, but also Alumbrera, Lomas Bayas and Punitaqui mines in 2016-2018, and Antapaccay and Lomas Bayas only in 2019-2020). This is to reflect the share of Antapaccay's activity only, in the "Other South America" copper activity[8].

Financial data shows that the EU based FIs that have been scrutinized for this case study have repeatedly participated in refinancing existing credit lines. In doing so, they have been able to maintain an uninterrupted business relationship with Glencore for several years. Thus, the participation in loans represents a special responsibility for the banks. In the issuance of shares and bonds, on the other hand, the business relationship between FIs and companies is much shorter, since only the placement of the securities in the capital market is accompanied. Even so, is up to them to decide not to support the Glencore in raising the funds it needs to continue operating or participate in the refinancing of the company's business if there is no improvement in the social and environmental problems at the company's mines. Therefore, this business relationship gives rise to an obligation to ensure respect for human rights and environmental standards.

Obligations of the EU based banks and investors under the CSDDD

The CSDDD proposal unjustifiably limits the scope of financial institutions' obligations. It requires them to conduct due diligence only before granting a credit, loan or other financial services. This is only once during the pre-contractual phase. It limits their responsibilities to the activities of their direct clients and other companies belonging to the same group, it states FIs would not have to observe any due diligence requirements when the client is an SME and finally, unlike other entities under the scope of its provisions, it does not require FIs to terminate their relationship with a company where this termination could cause "substantial prejudice" to that company.

These limitations are at odds with what UN and OECD sectoral standards dictate. As the UN Working Group on Business and Human Rights has clarified, "all financial institutions, of every type, have the same responsibility to respect human rights, and creating carveouts or presumptions for the financial sector in the draft Corporate

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[6] Verbatim, Profundo, Researhc and advice. "Glencore financiers: focus on Compania Minera Antapaccay », 28 September 2021

[7] See page 62, Glencore Annual Report 2021: https://www.glencore.com/dam/jcr:aab67399-639f-4cb2-be57-b3a66f8a91d6/GLEN-2021-annual-report.pdf

[8] Segment adjusters were calculated using the following sources: company annual reports and other publications. Where no data could be identified for one or multiple years, the segment adjuster from the most recent previous year was applied, using 2016 at the earliest.

Sustainability Due Diligence Directive would be inconsistent with international standards on business and human rights."[9]

The due diligence process should be ongoing, and therefore, implemented throughout the entire duration of corporate credits, loans and the provision of other financial services; **it should cover all entities in the value chain** regardless of their size and **there should be no exemption for FIs to consider ceasing or disengaging as means to or when all other appropriate measures have been exhausted to prevent or address adverse impact.** These major shortcomings massively underestimate the leverage that financial institutions can and should exert to drive change in company policies and it fundamentally undermines the avenues for accountability over their own business model. Therefore, the European Parliament has suggested several improvements in the Commission's text, regarding the inclusion of the financial sector, in line with international standards[10].

What do the OECD guidelines recommend?

In summary, the OECD Guidelines for the financial sector[11], recommend FIs to identify, prevent, mitigate and account for how they address actual and potential adverse impacts **in their own operations, their value chain and other business relationships regardless of the size or sector of the entities. Identification of potential and actual adverse impacts is an ongoing, iterative process.** The guidelines recommend FIs to adopt at least a two-tiered process (first and second screen) for the identification and assessment of actual and potential adverse impacts, alongside monitoring issues and complaints that may arise outside of this process.

The guidelines also recommend that FI's to embed responsible business conduct into policies and management systems, and aim to enable enterprises to remediate adverse impacts that they cause or to which they contribute. Where the due diligence process leads to the identification of risks or adverse risks or impacts associated with its clients, **the FI is expected to use and build its leverage.** For example, alerting the client of human rights risks to its knowledge, suggesting the client to take action and tracking the effectiveness of these efforts, **or exiting the relationship where efforts to prevent or mitigate harms fail.**

Obligations under the CSDDD

EU based FIs financing Glencore would be obliged to embed a due diligence policy in their corporate strategy to be overseen by the board of directors. The FIs must **identify potential risks and actual impacts of their client's operations and use their leverage** towards the company for them to take action to prevent the materialization of risks and mitigate and address the identified adverse impacts with regard to the environment and the human rights of local communities, workers and other relevant potentially affected stakeholders. This could be done for instance by means of contractual assurance and the establishment of an internal procedure for the verification of compliance.

The FIs would also be obliged to **develop prevention and correction action plans but to consult with stakeholders only "where relevant".** It is also problematic that

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[9]https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Statement-Financial-Sector-WG-business-12July2023.pdf

[10] https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html

[11] OECD Guidelines on Due Diligence for Responsible Corporate Lending and Securities Underwriting: https://mneguidelines.oecd.org/rbc-financial-sector.htm

there is no obligation for companies to obtain the Free, Prior and Inform Consent from Indigenous Peoples, neither to consult and cooperate in good faith with local communities prior to the commencement of any activity and throughout the implementation of the due diligence process. **Given the once off limitation of the due diligence duty at the pre-contractual stage**, they could get way with a very meagre implementation. If not in place yet, the CSDDD would also require the FIs to establish a complaints procedure where victims are entitled to request appropriate follow up and to meet the company representatives to discuss the severe impacts that are the subject matter of the complaint.

FIs would also be required to **implement a yearly monitoring process**, update their due diligence policy and make it public, following the specific requirements provided for by the Corporate Sustainability Reporting Directive (but not to communicate to the affected people about the outcomes of such monitoring). If they fail to do so, affected people would have the possibility to **submit substantiated concerns to any of the supervisory authorities** that the Directive mandates Member States to empower and resource. These authorities should in turn asses the concern, if admitted, it could **initiate an investigation, conduct inspections, and require the company to take remedial action or adopt interim measures** themselves if the harm is severe and irreparable. Other enforcement measures that non-compliant FIs could face from these authorities include the imposition of sanctions which in turn could exclude the non-compliant FI from public support.

These are all helpful provisions that already represent a step forward from the existing accountability measures governing FIs. **However, crucial improvements are strongly needed** from the European Parliament and the Council during the co-legislation process **to ensure that the Directive does not end up in a thick-box exercise but that effectively deters corporate misbehaviour** preventing harm and provides access to justice for people and the planet when harm does occur.

Human Rights and Environmental Impact in the case of Espinar.

A long list of adverse impacts identified by the research done by the EU-LAT network matches most of the violation and prohibitions listed in the annex of the proposal, and those that don't could be invoked in a complaint or lawsuit in the spirit of the catch all clause. However, this twofold approach creates ambiguities and risks promoting a selective application of standards. In the case of Espinar the most salient impacts were:

Environmental impacts:

- Pollution of the air, soil and water, illegal diversion of watercourses and operations in protected natural areas.

- Contamination of the Cañipia and Salado rivers by dust from mining transport and explosions from the mine's operations, industrial water discharges into the Cañipia river, and seepage from the Huinipampa tailings dam.

Human Rights impacts:

- With regards to Human Rights, health impacts are quite notorious: a government study[12] showed that there are more than 700 people living in the

[12] Between 2010 and 2014, the Peruvian State's Environmental Evaluation and Oversight Agency (OEFA) has repeatedly sanctioned Glencore for violations of Peruvian environmental legislation. Between 2010, 2013 and 2017, CENSOPAS sampled nearly 700 people and identified that they had toxic heavy metals in their bodies, and to date those affected do not receive specialized treatment

mine's area of influence who have been found to have toxic metals (of arsenic, cadmium, mercury and lead) in their bodies. All these people are in a phase of chronic toxicity due to the time they are exposed to toxic metals, which would be causing damage to their health, probably with an irreversible impact.

- Violation of the right to protest. Repression and police violence.Use of state powers such as declarations of states of emergency in order to stop strikes and community protests due to the company's inclination to reach agreements reached at conciliation tables.

- Criminalization and harassment

- Specific gender impacts: The contamination of the water by toxic metals implies the contamination of their children and of the environment on which the women sustain their economic activities such as cattle ranching. Health impacts such as anaemia in pregnant women was also high, especially among the Yauri community. Women are also the front line of the struggle in Espinar and therefore also the most exposed to police-military repression and violence from Antapaccay Mine's security company.

Furthermore, the expansion of the mine has caused displacement of local communities in Huano Huano, Pacopata y Huini Coroccohuayco, with little to no information provided by the company to the communities and **no stakeholder engagement process** in place[13]. **Whistle-blowers protectio**should be expanded to **protecting all Human Rights Defenders** in particular when based outside the EU where their vulnerability is particularly heightened.

Moreover, the company did not present the resettlement plan in compliance with the ILO convention 169 as required by the government when approving the licenses for the expansion of the mine. Strong protests from the local community have been met with police brutality (allegedly by order of Glencore[14]) resulting in **mental and physical violence against the protesters which lead to the death of 4 of them**.[15]

In terms of access to justice the Commission's proposal has major gaps. Although the civil liability provisions enable **victims in Espinar to seek judicial remedy in France, Germany, Spain or Italy** (the Member State where the EU financiers of Glencore are based), they would have to demonstrate that the harms they suffered – land grabbing, displacement, environmental pollution, toxic metal poisoning etc- are sufficiently linked to the failure of these financial institutions to comply with their due diligence obligation.

Under the mandatory due diligence legislation, victims could challenge the FI's alleged failure to seek to ensure that Glencore respected international environmental standards before the judicial and administrative authorities. If allegations were proven, the **financial institutions could be held liable for harm arising from its client's mining waste management as a result of its failure to conduct adequate due diligence** (however with some caveats). While the CSDDD proposal does include an overriding mandatory provision that would warrant the affected communities in Espinar right to remedy under EU law**, it does not address many other barriers for access to justice that claimants have to face**. In court, the **burden of proof** would still fall on the claimants who have limited resources and little access to evidence. The obstacles to **collective redress, time limitations and financial risk are also unaddressed** and

[13] Report "Actividades empresariales cuestionables de la mega-corporación minera suiza Glencore y responsabilidad de los bancos alemanes", S. Guhr, J. Sydow y S. Friess. Red sombra observadores de Glencore, 2017.

[14] Gestión (2016), Xstrata on trial in London for repression of demonstration in Peru, Feb. 24: http://gestion.pe/empresas/juicio-londres-minera-xstratarepresion-manifestacion-peru-2155169

[15] Report, "Impactos empresas mineras DDHH corredor minero Sur Andino", CooperAcción.

the proposal does not grant independent non-profit organisations with a legitimate interest in representing victims the right to act on their behalf.

If the 700 neighbours of the mine found with toxic metals in their bodies were to make a claim, to one of Glencore's financiers in the EU, **they would still have to bring individual lawsuits, be subject to unreasonable time limitations which differ in each jurisdiction within the EU and, bear the high legal costs of the proceedings** without the possibility to recover them from the defendant financial institution if claimants win, or without the possibility for the costs to be balanced by the court in light of the disparity of resources between the parties if they lose.

Conclusions and recommendations for the EU on Corporate Sustainability Due Diligence Directive

EU financial institutions have been linked to land grabbing, deforestation, corruption and violence against communities and land and environmental defenders [16]. Financial institutions can, and do, exercise influence over business because **financing plays a critical role in a company's ability to do business**. Thus, the principles of responsible business conduct apply equally to the financial sector via their choice of clients and the projects that they fund. FIs must take appropriate measures to identify, prevent, mitigate, minimize or address the negative consequences of their client's activities on people and the planet in the same detailed way in which they manage and mitigate financial risks. **By carrying out due diligence, FIs can ensure that financing flows to projects and companies that behave responsibly**.

Despite repeated mentions to alignment with international standards throughout the text, it is clear that the **CSDDD falls short on some of the key aspects, among others, value chain, company and material scope and the due diligence obligation's overly emphasising on contractual relationships and third-party initiatives rather than on the principle to prevent potential impacts** and address actual ones by means of a variety of procedural tools. When it comes to regulating financial institutions in particular, co-legislators must ensure that the European Directive builds upon the existing sectorial guidance for the sector provided by the OECD and enshrine its comprehensive approach for the financial sector into binding European legislation and in line with the proposal of the European Parliament's INL on the matter[17].

The EU must be more ambitious to fill the current regulatory gap and introduce mandatory requirements for all financial institutions to carry out ongoing due diligence and consistently incorporate sustainability risks across their entire value chain. Concretely, co-legislators should improve the CSDDD proposal ensuring that financial institutions are:

- There are no exemptions in the value chain scope of financial institutions compared to the definition applicable to other companies in the scope of the Directive (Art 3.g)
- Held to the same ongoing due diligence obligations as other companies included in the scope of the proposal. Particularly considering the long-term nature of investment, crediting and other financial sector activities, due diligence requirements for FIs can't be limited to the pre-contract stage of the business relationship (Art 6.3).
- Required to suspend or stop providing a financial service to a company in the same way and under the same circumstances outlined for other companies under the scope (Art 7.6 & 8.7)

[16] Global Witness Report, Indecent exposure: https://www.globalwitness.org/en/campaigns/land-deals/indecent-exposure/

[17] EP INL includes financial sector under scope, see recital 9 and 17 in reference to Art 2: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf

Furthermore, this improvements in the regulation of the financial sector must be part of the overall refinement of the provision notably as recommended by ECCJ in its comprehensive analysis of the CSDDD[18]:

- **Due Diligence obligation:** The general duty should more clearly prevail over any of the specific measures listed in the proposal – such measures should always be assessed against said general duty. The role of contractual assurances and verifications should be minimised and subject to strict quality requirements, already in the directive, in order to ensure their effectiveness.

- **Value chain scope:** The directive should turn back to UN and OECD standards, adopt a risk-based approach, and prioritise impacts on the basis of their severity and likelihood, not the characteristics (duration or intensity) of their business relationships.

- **Civil liability:** The directive should ensure a fair distribution of the burden of proof. Companies must also remain liable, even where they have sought to verify compliance through industry initiatives and third-party audits. Other major barriers to justice often faced by claimants in business-related human rights and environmental cases should also be addressed. In particular, the directive should ensure that the limitation periods for bringing liability claims is reasonable, that claimants have recourse to collective redress mechanisms, that civil society organisations and trade unions are entitled to bring representative actions on behalf of victims, and that Member States set up accompanying measures to provide support to claimants.

- **Material scope:** To fill the existing regulatory gap in the material scope of the proposal, the directive should define the adverse impacts under its scope by means of a non-limitative list of human rights instruments and expansive targeting of all sorts of possible environmental damages, whether they have direct implications on human rights or not.

- **Climate obligations:** The directive should mandate concrete obligations for all companies to develop and implement an effective transition plan in line with the Paris Agreement, including short-, medium- and long-term reduction targets. These obligations must be enforceable by courts and public authorities.

- **Company scope:** In coherence with the UNGPs and the OECD Guidelines, the Directive should mandate that all companies "regardless of their size, sector, operational context, ownership and structure" are cover under the scope. The scale and complexity of the measures taken to comply with the due diligence obligation may be proportional to the size and commensurate to the severity of the risks of the company.

- **Gender responsiveness:** The directive must include gender-sensitive human rights and environmental impact assessments and indicators in all steps of the due diligence process; if not, it will render invisible the specific risks and additional barriers faced by women and/or groups in vulnerable situations.

[18] ECCJ Comprehensive Analysis of proposal for a directive on Corporate Sustainability Due Diligence: https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf

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